No. 336

Reply Brief of Crane

Filed Jan. 8, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

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JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT,

v.

WILLIAM GRIGG, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

REPLY BRIEF OF APPELLANT.

M. M. CRANE, Att'y Gen'l,
Attorney for John W. Baker, Sheriff, Appellant.

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Since the appellant's brief was filed in this case, counsel for appellee have filed a printed brief of fifty-one pages, and in addition thereto an argument of fifty-eight pages. To these appellant desires now to reply.

In their brief they insist that but two questions are involved in the case. They are as follows:

First, Did the Circuit Court of the United States for the Northern District of Texas err in assuming jurisdiction by way of habeas corpus in advance of a trial by the State courts?

Second, Is the act of March 30th, 1889, upon which the indictment was based, violative of the Constitution of the United States?

They premise their discussion of these two questions by the statement that it is the duty of the Federal Courts to guard, protect and preserve the Constitution of the United States. That is conceded. But, it is not their exclusive duty. This court has said:

"Upon the State Court *equally* with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the *judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the Supreme law of the land*, 'anything in the constitution or laws of any State to the contrary notwithstanding.'" Robb vs. Connelly, 111 U. S., 637.

The language is again repeated and approved by this court in in Ex Parte Royall, 117 U. S., 248. It appears, therefore, that the suggestion of appellee's counsel to the effect that the duty of guarding the Constitution devolves *exclusively* upon the Federal judiciary is not in accord with the decisions of this court. Bearing in mind that the duty of guarding the Constitution of the Federal Union is as binding on the State courts as it is on the Federal judiciary, no reason can be assigned why the appellee in this case should have been taken from the State court before trial and compelled to submit to the jurisdiction of the Federal Circuit Court.

Counsel for appellee, on pages ten and eleven of the brief, in undertaking to give a reason why the writ of habeas corpus was asked for by appellee, makes the following statement:

"*No complaint is made by appellee*, who was the relator below, as to *any action of the State courts in the progress of this prosecution, except that the highest court of the State of Texas having criminal jurisdiction, failed and refused to pass upon or adjudicate the rights of this appellee and his co-defendants as citizens of the United States under the Constitution thereof, and that he was unable to get a trial.* The record here abundantly demonstrates, and that without contradiction on the part of appellant that an honest attempt was made to have the rights of this appellee and his co-defendants as citizens of the United States under the Constitution thereof, determined and adjudicated by the highest court of the State of Texas having criminal jurisdiction, in which they were unsuccessful."

This statement of appellee's counsel simplifies the issue. It is an admission. They state substantially that they base their right to seek relief by *habeas corpus* in the Circuit Court of the United States upon two propositions only:

First, That the Court of Criminal Appeals of Texas, the court of last resort in criminal cases, failed and refused to pass upon or adjudicate the rights of this appellee and his co-defendants, as citizens of the United States, under the Constitution thereof.

Second, that he was unable to get a trial in the trial courts of the State.

The first question that arises is:

Did the Texas Court of Criminal Appeals refuse or fail to pass upon or adjudicate the rights of the appellee, secured to him by the Constitution of the United States?

If the court did not so fail or refuse, this part of his application must be held insufficient. The record discloses that appellee was never tried, never convicted, never appealed, and hence never reached the Court of Criminal Appeals. That high tribunal acquired no jurisdiction over his person. It was therefore powerless to enter any decree, order or decision affecting his rights. How appellee can charge that that tribunal refused to determine his rights under the Federal Constitution when he was never before that court asking for such decision, is difficult to understand. There is not even a pretext for the contention made in the first proposition by appellee's counsel that the Court of Criminal Appeals refused or failed to adjudicate his rights under the Federal Constitution unless that contention be based upon the idea that Hathaway's trial, conviction and appeal can be considered as the trial, conviction and appeal of appellee. They have effectually waived that, however, in the admission made on page 11 of their brief, in which they say: "Counsel for appellant have endeavored to obscure the issue as to jurisdiction by a lengthy argument relating to the point that appellee has never had a trial; that his case is entirely distinct from that of Hathaway; that he has never made any attempt to present to the court his defense as to the unconstitutionality of the Act of March 30th, 1889, and a great deal more upon that line. Counsel for appellant should not mistake the issue, nor

endeavor to mislead the court as to the issue. *Hathaway has been eliminated from this case.*" (Appellee's brief, bottom of page 11).

The suggestion that counsel for appellant is endeavoring to mislead the court, may be passed as unworthy of notice. But I now ask the counsel for the appellee, when did the Texas Court of Criminal Appeals fail to adjudicate the rights of appellee secured to him by the Constitution of the United States? Was he ever before that court? Is not the contention based upon the idea that Hathaway's appeal and Hathaway's case was the appeal of appellee in appellee's case? If Hathaway be eliminated from this case, how can they fairly say that the Court of Criminal Appeals refused to perform its duty to appellee. It seems most illogical for counsel to say that Hathaway has been eliminated from this case, and then devote pages of their brief and argument to demonstrate the errors made in his trial. The greater part of their writ for habeas corpus is taken up with the description of Hathaway's indictment, trial, conviction, subsequent incarceration, his appeal to the Court of Criminal Appeals, and its delay in passing on his case, together with the alleged argument of State's counsel in that case; the fact that he applied for a writ of habeas corpus is noted, and that afterwards the case against him was dismissed in the State court by the then County Attorney. Counsel for appellee even go so far as to question the motives of the County Attorney in dismissing that case, and charge that it was done because he was afraid to meet them in the Federal Court to test the constitutionality of the statute. They fail to state, however, why counsel for the State was not afraid to meet them in the Federal Court in this case, and why appellee's case was not likewise dismissed. I have heretofore shown in the original brief that the then County Attorney of McLennan County had express statutory authority for the course that he pursued, in reference to the dismissal of Hathaway's case. The ordinary presumption is that an officer has done his duty as he understands it. There is nothing in the record to indicate that Hathaway after the reversal of his case ever asked for a trial in the State court. Perhaps this writ of habeas corpus was the first time that it was called to the attention of the County Attorney.

But what has his motive to do with the question? If as appellee's counsel say Hathaway has been eliminated from this case, why are any of these questions being discussed by them, or why should the proceedings of Hathaway's case be called to the attention of this court in this? It seems that counsel for appellee are at a loss for some substantial reason for their application to the Federal court for a writ of habeas corpus; when they complain at the action of the court of last resort in Texas they must base their allegations upon the rules, decisions and orders had in Hathaway's case, because appellee's case, as before shown, never reached that court. Then when the difficulty of making a vicarious atonement of Hathaway is called to their attention, and when the absurdity of their contention is made manifest they exclaim most vehemently that *Hathaway is diminated from this case.* With Hathaway must go all complaints as to the action of the court in his case.

But suppose, for argument's sake, that it be conceded that the trial of Hathaway was the trial of appellee; in other words, suppose the appellee was tried in the District Court of McLennan County, convicted, and appealed to the Court of Criminal Appeals, and that the Court of Criminal Appeals had then decided in his case that the facts did not justify his conviction, or that the indictment in that case was not sufficient, but failed to pass upon the constitutionality of the statute upon which the indictment was based. Would the failure to pass upon the constitutionality of the statute entitle appellee to apply to the Circuit Court of the United States for a writ of habeas corpus before submitting the case again to the trial court under the instruction of the Court of Criminal Appeals? In other words, does the failure of the Court of Criminal Appeals, the court of last resort, to decide more than enough to dispose of the case, entitle him to a writ of habeas corpus in the Federal court?

The question, I know, is absurd, but it is suggested by the grave and learned argument of counsel for the appellee in this case. If it would not authorize the writ of habeas corpus to be issued, then certainly on that branch of the case counsel for appellee have no standing, and the writ of habeas corpus was improvidently and illegally issued in the court below, unless it can be justified upon the second ground above mentioned. As be-

fore indicated, had the appellee in this case been tried and appealed to the Court of Criminal Appeals and the constitutional question been fairly presented, it would not have been proper for that high court to have decided the constitutional question, unless it became necessary to the disposition of the case. On that point an eminent text writer uses the following language:

"Where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." Cooley's Constitutional Limitations, Sixth Edition, 196, and authorities there cited.

There was "another and clear ground" upon which the Court of Appeals rested its decision, viz., that the evidence was insufficient. So that instead of the Court of Criminal Appeals subjecting itself to the severe criticism which counsel for the appellee have made, it was entitled to commendation, because it was but following the beaten path laid down by the courts of last resort and by the most eminent text writer on constitutional questions that has lived during the past century.

Reduced to its last analysis, appellee's position is that the recognition of the well-established rules of judicial propriety by the Texas Court of Criminal Appeals gives him the right to apply for a writ of habeas corpus in the Federal courts. Is it not absurd?

Counsel for appellee insist that I did not correctly state in the original brief the ground on which the Court of Criminal Appeals based its decision in the Hathaway case.

I stated, in substance, that the court reversed the case because the evidence was insufficient to support the conviction. Counsel for appellee say that it was because the indictment was insufficient.

This court will be able to judge whether I correctly stated the ground or not.

The Court of Criminal Appeals, in discussing the matter, used the following language:

"It will be seen that the State, by its testimony, failed to reach defendant with any evidence even tending to show that he was an original conspirator, or that he entered into a conspiracy in restraint of trade, which, of course, would apprehend that he had full knowledge of the object and purpose of such conspiracy, and its plan of operations. And when we come to consider his testimony, his evidence shows that his only connection with the alleged trust, was as agent and employee of the Waters-Pierce Oil Company, at a stipulated salary of $2,700 a year. * * * Certainly there is no testimony of any connection on his part, or that he had anything to do with the oil trade in McLennan County. McLennan County was in another and distinct division, and not under his management or control. Not only does the State fail to furnish any affirmative proof bringing him in contact with the transactions of Grice and Hawkins in McLennan County, but by his own testimony he negatives the proposition that he had anything whatever to do with the oil trade or with cutting rates on oil in McLennan County. * * * Of course, if there was any testimony in this case showing that he was one of the original conspirators, or that he entered into a conspiracy after it had been formed, he might be affected by the acts of the agents of the said trust in McLennan County. But, as we have seen, there is no such testimony. If he had been indicted as an agent for some act done in McLennan County, the proof would not have sustained the accusation, because there is no testimony that he acted as such agent or in conjunction with any agent of the trust in McLennan County, nor is there any evidence tending to show that he advised, aided, or encouraged any man in Texas, or anywhere else, to enter into the conspiracy, or to act as agent therefor."

It is manifest that the construction which I placed upon the decision of the Court of Criminal Appeals is the only one of which it is susceptible. It is true that the court said that if appellant had acted as an agent for the conspiracy, with full knowledge of its purposes, and proof had been made of this fact, he could not be convicted under the allegations of this indictment, for the reason that if he be held responsible as an agent the indictment must allege that he knew of the conspiracy and its purposes. (Record, p. 63.) But previous to that the court had said:

"If he had been indicted as an agent for some act done in McLennan County, the proof would not have sustained the accusation, because there *is no testimony* that he acted as such agent or in connection with any agent of the trust in McLennan County, nor is *there any evidence tending* to show that he advised, aided or encouraged any man in

Texas, or anywhere else, to enter into this conspiracy, or to act as agent therefor." (Record, p. 63.)

It seems to me too clear for argument that the Court of Criminal Appeals reversed the Hathaway case because the evidence was insufficient to connect him in any way with the original conspiracy, or with any illegal transaction connected therewith, as agent or otherwise. The court held that he could not be convicted, for want of testimony. But this controversy between the counsel for appellee and appellant is wholly immaterial. The point was not raised in the lower court. *The appellee did not base his petition for habeas corpus upon the ground that the indictment by which he was charged was insufficient*, but upon the fact that *the Court of Criminal Appeals had failed to determine the validity of the statute upon which he was indicted;* and, second, that the trial court had *denied him a trial*. The insufficiency of the indictment to charge appellee as agent, is immaterial. It does not charge appellee with being an agent, and as to whether he is guilty of being an original conspirator or aiding the original conspiracy so as to make him a principal offender, is a matter into which this court will not inquire. Not being charged as an agent, he cannot be tried as an agent; that much is certain. But as to whether the evidence is sufficient to convict him under the present indictment, is a matter of no consequence. It is proper to say, however, that the statement of appellee's counsel, to the effect that the cases of Hathaway and the appellee rest substantially upon the same facts, is not agreed to. On the contrary, while the record is silent on the entire subject, the contention of the State's counsel is that the facts in the two cases are essentially different.

An inspection of the application for writ of habeas corpus will demonstrate that it is based on the idea only that the Court of Criminal Appeals failed to determine the validity of the State statute and because the trial court refused him a trial—but not because the indictment was insufficient to charge him as agent. But suppose it were otherwise? How can this court in this case determine that the State of Texas will not be able to prove all of the allegations in the indictment against the appellee? There is no allegation in the petition for writ of habeas corpus that the evidence is insufficient to convict him, and even if there

were such an allegation, I apprehend that this court would require that issue to be tried in some other tribunal. Certainly this court will not make a writ of habeas corpus perform the office of an appeal or writ of error, and by it undertake to do more than determine the legal questions involved, leaving the issues of facts to another tribunal.

It seems to me that the appellee is in no position to complain of the action of the Court of Criminal Appeals in Hathaway's case, no matter from what standpoint this controversy may be viewed. In so far, therefore, as his application for writ of habeas corpus is based upon the failure of the Court of Criminal Appeals to decide the validity of the statute, it must fail, because a sound public policy demands that no one shall dictate to a court of competent jurisdiction what it shall decide in a given case, provided it decide every point necessary to the determination of the particular controversy.

This leads, therefore, to the consideration of the second proposition upon which the application for a writ of habeas corpus was based, i. e., that the State trial court denied appellee a trial.

"*Did the District Court of McLennan County deny the appellee a trial?*"

To say that the appellee was denied a trial presupposes that he asked for one. I submit that there is nothing in the record to indicate that the appellee ever, at any time, went into the District Court of McLennan County, Texas, and asked to have his case tried or even asked to have it set down for trial. The allegation in reference to that point and the only one giving this court any information thereon, is contained in appellee's petition for writ of habeas corpus, which reads as follows:

"Your petitioner further shows that since the rendition of said judgment by said Court of Criminal Appeals (meaning judgment in the Hathaway case) two terms of said District Court of the 54th Judicial District have been held, one of which is *now nearing its close;* and while this petitioner, together with his codefendants who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his codefendants not only to the shame and

contumely of an indictment for felony, but denying to him and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner as well as his codefendants are without a remedy in the State courts of Texas for the assertion and vindication of their rights under the Constitution of the United States." (Record, p. 5.)

There is no statement in the paragraph quoted to indicate that appellee ever *asked to have his case tried* or ever *asked to have it set down for trial.* It will also be noted that the appellee makes no complaint as to any delay in the trial in the District Court until *after the reversal of Hathaway's case.* It appears from the paragraph of his application above quoted that the appellee charges that there were two terms of the District Court held since the reversal of Hathaway's case, and one of them was still in session though "nearing its close" at the date when the writ of habeas corpus was sued out. (Record, p. 5.)

2nd. That appellee and his codefendants stood "ready and anxious" for trial, but appellee fails to allege that he asked for a trial or that he communicated the fact of his "anxiety" therefor to any person. From appellee's application it must therefore be clear, that (*a*) he complains of nothing done by the trial court before the reversal of Hathaway's case. (*b*) That but two terms of the trial court had been since held, and one of them was then in session.

It will be noted that there is no allegation in the paragraph quoted to the effect that the appellee ever asked to have his case tried, or ever asked to have it set down for trial. If the facts had justified the allegation, the presumption must be indulged that it would have been made. He also makes clear the point that but two terms of the District Court have been held since the reversal of Hathaway's case, and that one of them was still in session at the date that the application for writ of habeas corpus was made. In the language of the application, "it was nearing its close." The case then stands this way: Appellee complains because the Court of Criminal Appeals did not decide the constitutional question in Hathaway's case. As presented, I submit it would have been improper for it to have decided it. Certainly its decision was unnecessary.

The other jurisdictional ground is that his case was not called

for trial at either of the two terms of court held after Hathaway's case was reversed; although, as repeatedly shown herein, he fails to allege that he ever asked for a trial, or ever asked to have the case set for trial, although one of the two terms of court was still in session when his petition for habeas corpus was presented. It is upon these grounds that he seeks the jurisdiction of the Federal court.

When one seeks the extraordinary remedy of habeas corpus at the hands of the Federal court for the purpose of being taken away from the State court before a trial and judgment, he ought to state to the court, in clear and unambiguous language, facts which clearly authorize the Federal court to interfere, and which make his a "peculiar and urgent case." The postponement of a case for one entire term and a portion of another is not such an abuse of discretion as would justify the application. It certainly does not make the case a "peculiar and urgent" one, such as this court has said must exist before the Circuit Court should act. In this connection permit me to repeat that the appellee has not stated the case in clear and unambiguous language. He has not stated under oath, in his application for a writ of habeas corpus, that the trial court denied him a hearing, but he has contented himself with stating that he "stood ready and anxious" for a trial, and that the court had not tried him nor called his case for trial. From this expression that he stood "ready and anxious" for a trial he desires this court to *infer* that he asked for a trial, but that he could not obtain it. Can it be said that because a man has stood ready and anxious for a trial that he must of necessity have sought one? Does the implied readiness and anxiety necessarily mean that he has tried to accomplish the purpose for which he stood ready and anxious? Surely not. But if the language is susceptible of that construction, then it is controverted by the return of the sheriff. That officer, on his return to the writ of habeas corpus, uses the following language: "I would respectfully show to the court that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties toward relator and his codefendants. That said authorities have *'been anxious and ready'* to accord to all the defendants under the indictment heretofore mentioned that speedy

trial which they were accorded under the constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come in a great part of their own seeking, and by virtue of their own acts. That the call docket of the District Court of the Fifty-fourth Judicial District of the State of Texas, where such indictment is pending, shows that at the first term of said court, after such indictment was presented, said case was set down for trial on March 14th; that upon the call of said docket for trial it was continued by agreement between the State and defendants; that at the succeeding September term, the case was set down for trial on October 4th, but on call of the same for trial, it was continued upon the motion of defendants; that it was again set down for the November term, to be tried December 2nd, 1895; that when the case was called relator claimed a severance, to which they were entitled under the laws of the State of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating the trial of relator herein." (Record, p. 69.)

It will be noted from the above that the sheriff says in his return that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties toward this relator, and that said authorities have been "*anxious and ready*" to accord to all the defendants under the indictment heretofore mentioned that speedy trial which they were accorded under the constitution and laws of the State of Texas. If appellee insists in this court that the allegation in his petition for habeas corpus, to the effect that he stood ready and anxious for a trial in the State court, is sufficient for this court to infer that he meant to be understood as saying that he had sought and failed to get a trial; then I would submit that the answer of the sheriff to the effect that the State authorities have been "anxious and ready" to accord to all the defendants under the indictment that speedy trial to which they were entitled under the constitution and laws of the State, is a sufficient answer thereto and complete denial thereof. The appellee insists that he was "ready and anxious" for a trial, and therefore asks this court to infer that a trial was denied him. If that construction be placed upon his language, then I insist that the language of the sheriff to the effect that the State authorities

have at all times been "anxious and ready" to accord him that speedy trial to which he was entitled under the constitution and laws of the State, should be interpreted to mean that they had offered him a trial and he had refused it, and therefore controverts his allegation in his petition.

In other words, I insist that when the return of the sheriff uses precisely the same allegations in reference to the State authorities that appellee uses in reference to himself, that they ought to have a similar effect and interpretation. Give the appellant the benefit of that construction which appellee seeks to have put upon his own language, and the return of the sheriff cannot be regarded as other than a complete denial of the allegations made by the appellee and all the inferences to be deducted therefrom. The action of the Circuit Court of the United States, in granting the writ of habeas corpus, was not justified by any allegation in the petition of appellee. The return of the sheriff, however, should have prevented the discharge of the prisoner, even had the petition been sufficient.

The Court of Criminal Appeals was not derelict in its duty in refusing to decide the constitutionality of the statutes in the Hathaway case. It decided enough to dispose of the controversy between him and the State. But whether it did or not, appellee had no cause to complain.

Appellee's petition for habeas corpus, as before indicated, was insufficient to show that the District Court of McLennan County failed and refused to grant him a trial. Controverted as it was by the return of the sheriff, the prisoner should have been remanded to the State court. The return of the sheriff imports absolute verity on its face.

Crowley vs. Christensen, 137 U. S., 86, 94.

To hold appellee's petition sufficient would be in effect saying that whenever the statute of the State is suspected of being in conflict with the Federal Constitution and the court of last resort in the State fails to determine that question in the first criminal case arising thereunder, that any other person indicted for the violation of that statute, if he can show that his case was not tried at the second term of court, although he does not deny that one of the postponements was on his own motion, and does not

allege that the court refused to try him, may seek relief in the Circuit Court of the United States. Such a precedent would have nothing in it to commend it to thoughtful people. It would encourage conflicts in the jurisdiction between the State and Federal courts, and would be a source of embarrassment to those courts that otherwise would never exist. It would still more greatly embarrass the State courts in the administration of the laws made by the legislature.

In answer to the suggestion of counsel for appellant to the effect that appellee went into voluntary confinement in order that he might sue out his writ of habeas corpus, counsel for the appellee grows serious and insists that the appellee was in custody while he was out on bond. It is conceded that the statement is made in many of the authorities that a prisoner is in the custody of his sureties, but I understand that to be a fiction of law. The courts do not mean to decide more than to hold that the sureties have the right to control the movements of the accused. They do not mean to hold that he is in actual custody, and if counsel for the appellee believe to the contrary, if they believe that a man out on bond is in actual custody and actual restraint, as they argue, why did they surrender their client into the hands of the sheriff before suing out the writ of habeas corpus? Why did they not go to the Circuit Court of the United States and say that he was unlawfully restrained of his liberty by his sureties? It is too absurd for argument, and counsel for appellee can not help their contentions in this case by undertaking to put me in a position of controverting the statements of all of the law writers to the effect that the sureties have the right to control the movements of the accused, and in that sense the accused is their prisoner. My statement that the accused is not in actual custody when he is out on bail, is sufficiently corroborated by the action of the learned counsel for the appellee, who procured their client in this case to be surrendered to the sheriff before they sought the interposition of the court to give him his liberty.

But counsel for the appellee say that it is no part of the business of appellee to know by what reason or what motive the appellant was surrendered into the custody of the law. There might be some force in that contention if made in a proper case; but in cases like this, where the imprisonment of their client is made the basis

of their complaint, it is proper to show that the imprisonment was voluntary. This is particularly true here, because the record indicates that they have willingly submitted to the delays of which they now complain, and have sought the custody of an officer for the sole purpose of changing the venue of their cases from the State to the Federal court.

Counsel for appellee are not justified, as I have heretofore stated, in the assumption that the State did not want to try the appellees. It might, with better show of reason, be stated that the appellees did not want a trial in the State court. Why? Because their petition for writ of habeas corpus though drawn out to a great length, failed to allege that they went into the State court and asked for a trial, or to have a day for trial fixed. Had it been true, it would have been alleged.

I would respectfully submit, therefore, that there is nothing in this record to justify the issuance of the writ of habeas corpus by the Circuit Court of the United States for the Northern District of Texas.

It is hardly necessary for me in this connection, to disclaim the position so generously (?) assigned me by counsel for appellee. They found by "reading between the lines," that I think a State court can do no wrong, and that a Federal trial court can not do right. Wonderful discovery that! How great must be their power to be able to read that which was never written—to hear that which was never uttered nor conceived in my mind. There is nothing in my brief to justify the suggestion. There is nothing in any utterance or act of mine that will excuse it—unless it be that I have prosecuted this appeal. That is the "head and front" of my offending.

If I am right in the foregoing, it must follow that the Circuit Court of the United States for the Northern District of Texas had no jurisdiction to issue the writ of habeas corpus. But, if the court goes farther than this preliminary question and looks into the validity of the statute, then I submit the counter-proposition that:

The statute is valid, and that it does not arbitrarily discriminate between different citizens and classes of citizen of the State of Texas and the United States, and that it does not deny to cer-

tain citizens and classes of citizens the equal protection of the laws.

In support of the proposition that the law is invalid, counsel for the appellee have cited numerous cases, some of which were examined by me in the original brief. It is not my purpose to repeat anything therein stated. For that reason, the first case cited by counsel for appellee will not be further noticed here. The case of Duncan vs. Missouri, 152 U. S., 382, is relied on. In that case it was contended by Duncan that the Constitution of Missouri secured to him the right to have his case adjudicated on appeal by a supreme court of five judges, that being the number provided by the State Constitution at the date of the commission of the offense with which he stood charged. Subsequent to the commission of this offense, the Constitution had been amended so as to authorize his case to be decided by three members of the court. He insisted that the amendment was obnoxious for the reason that it denied him due process of the law and the equal protection of the law and abridged his privileges and immunities in contravention of the 14th amendment. The court in that case answered him by saying that due process of law and equal protection of the laws were not denied him, because the law operated upon all alike and did not subject him to any arbitrary exercise of the powers of the government.

The case of Harding vs. People, 160 Ill., 459, and Millett vs. People, 117 Ill., 294, upon which they rely, hold in substance and effect that "due process of law" and "law of the land" are synonymous and refer to general public law, operating upon all alike, and not to such as singles out and designates without reason particular persons and classes. As to that general proposition, there can be little doubt. The definition therein given is practically the same as that recognized by the law-writers everywhere. If the statute involved in the case at bar discriminates *without reason*, then those decisions are applicable. In the cases of Frorer vs. People 16 L. R. A., 492; Ex Parte Jentich, 32 L. R. A.; and the State of West Virginia vs. Goodwell 6 L. R. A., 621, the same general proposition is maintained. In In re Garribad, 19 L. R. A., 858, upon which appellee relies, the doctrine is announced that an ordinance which prohibited street parades with shouting, singing or music, without

obtaining permission from a city officer, but excepting from its provisions funerals, fire companies and political parties having a State organization, is unjust because of unreasonable discriminations; but in that case the fact was recognized that just discriminations could be made. There is nothing in that case which in any sense militates against appellant's position in this.

In the case of the State vs. Loomis, 115 Mo., it was held by a divided court that a statute prohibiting miners from issuing certain classes of paper to their employees and paying them in goods rather than in money was null and void because it was an unreasonable discrimination against miners. In a very learned dissenting opinion by Mr. Justice Barkley, the opposite view was very strongly presented. To this opinion and the authorities there cited, attention is respectfully asked. State vs. Loomis, 115 Mo., 320-326.

I have been unable to find the case of State vs. Inro, 120 Mo., which appellee's counsel cite, for the reason that it is not in the book cited by them. In the case of the State vs. Walsh, 37 S. W. Rep., 112, the Supreme Court of Missouri decided that a statute which prohibited pools being sold except on the premises of the seller or inside of the race-course, was unconstitutional in that it conferred a special privilege that was denied everybody else,—*for which discrimination no reason could be given.*

Another case cited by appellee is that of the People vs. Marks, 99 N. Y. It was there held that a legislative enactment which absolutely prohibited an important branch of industry, not injurious to the community and not fraudulently conducted, solely for the reason that it competes with another, is unconstitutional. It is manifest that the cases above cited have no application to the question in hand. In the case of Wallace Heirs, 2 Yerger, 555, the Supreme Court of Tennessee held that the law of 1827, authorizing the court to dismiss all cases prosecuted for the use of another, was a partial law and therefore obnoxious to their State Constitution. In the other Tennessee case, Van Zandt vs. Waddell, 2 Yerger, 270-71, it was held that a partial law, tending directly or indirectly to deprive persons of vested rights or the equal benefits of the laws of the land, was unconstitutional and void.

In the case of Dent vs. W. Va., 129 U. S., 114, cited by appellee, it was held that there was nothing of an arbitrary character in the statute in question, as it was made to apply to all physicians except those who might be called from another State. The court held that it imposed no conditions that could not be readily met; and it was made enforceable in the usual mode in kindred matters, i. e., by the regular proceedings adapted to the case. Instead of supporting appellee's contention, it seems to me to aid appellant, because I believe it will be found that there is nothing of an arbitrary character in the statute under review in this case. It was made to apply to all persons except those who were dealing in the products of their own labor. It imposed no conditions which cannot be readily met, and it is made enforceable in the usual mode in kindred matters, i. e., by regular proceedings adapted to the case.

The case of County of San Mateo vs. Southern Pacific R. R. Co., does not support the proposition stated by appellee. That decision follows the others in this court upon the subject of taxation, and recognizes that different rules may be applied to different kinds of property, and different methods of taxation may be resorted to. The dissimilar conditions of property render that absolutely fair and just. This is illustrated by cases cited in our former brief: State Railway Tax Case, 97 U. S., 912; Kentucky Tax Cases, 115 U. S., 578, and others there cited.

The cases which counsel for appellee rely upon may be classified as follows:

1. Those which hold that the regulation of the business of miners, compelling them to weigh coal in a certain manner, or to pay wages in money and not in merchandise, is void. Such as the Illinois, West Virginia and Missouri cases.

2. Those which provided different rules for the collection of debts from a certain class of debtors, and which the courts have held have no reason to support the discrimination. Such is the case of G., C. & S. F. vs. Ellis, 165, U. S.

3. Those that hold that no law can be passed giving to certain individuals an arbitrary right not given to others similarly situated. Such are the Tennessee cases.

It is unnecessary to say that the statute under discussion does not fall within any of the classes named. It prescribes no rules

for the collection of debts. It does not purport to give any arbitrary right or remedy to any one not granted to others similarly situated. The Missouri, West Virginia and Illinois cases, which deny to the legislature the right to regulate the mining business, are not universally admitted to have been correctly decided. Other cases, equally as well reasoned and by courts quite as eminent, announce a different rule. The proposition that the legislatures may regulate the mining business in the several States, and protect the mining employees from the avarice and rapacity of the employer, is believed to be supported by the following authorities:

Charleston vs. Rogers, 2nd McCord, 496.
Stokes and Gilbert vs. New York, 14 Wendell, 87.
Schaffer vs. Union Mining Co., 55 Maryland, 74.
Hancock vs. Yadin, 121 Ind., 366.
Jones vs. People, 110 Ill., 590.
Archer vs. Jones, 2 Best & S., 89.

To these may be added a political authority: Adam Smith's "Wealth of Nations," Chap. 10.

But the result of this case need not depend upon the soundness or unsoundness of the rule announced in the cases cited by appellee. Those support the proposition that discriminations made by statutes which are purely arbitrary cannot be upheld. Those cited by appellant hold that where sufficient reason exists for the classification made the statute is valid. This much is implied in those cited by appellee. After all, the principal difference between the various courts does not seem to be in the announcement of the rule, but in its *application* to particular facts of each case. If the discrimination in this case is held to be arbitrary, supported by no sufficient reason which would call for the exercise of the legislative discretion, then, under all the cases, it would be held to be invalid. But, if a reason existed for the discrimination made, sufficient to call for the exercise of legislative discretion, then the statute must be upheld, whether this court believes it a wise or unwise discrimination. The power to discriminate in statutes is everywhere recognized. The great bulk of our legislation sufficiently attests that. As to what con-

ditions will justify discriminations, is the only debatable point. Of that, more will be said later.

Counsel for appellee seems to be very much at sea as to specific objections made to the statute in question. For instance, one of the first objections urged by them is, that it is applicable only to a small percentage of the population of Texas; that it is therefore void. This court, as well as all others, however, has held that it is immaterial *how many* or *how few persons* are affected by a statute, provided it applies to all persons and property similarly situated. Hays vs. Mo., 120 U. S., 111–112; Powell vs. Commonwealth, 114 Pa. Stat., 265; Powell vs. Pa., 127 U. S., 678; State vs. Addington, 77 Mo., 110; Butler vs. Chambers, 36 Minn., 69; Railroad vs. Beckwith, 12 U. S., 196; Walston vs. Nevin, 128 U. S., 578; In Re Obe, 21 Ore., 406; Youngblood vs. Trust & Savings Co., 12 Southern Rep., 579; Waterworks vs. Schotler, 110 U. S.; Wurtz vs. Hogeland, 114 U. S., 606; Railroad Co. v. Richmond, 96 U. S., 521–529; Jones vs. State, 78 Ind., 332; McAunich vs. Mississippi Railroad, 20 Ia., 338.

Appellee next insists that the statute is an attempted regulation or interference with interstate commerce, and is therefore void. It is well settled that the construction put upon a State statute by its own Supreme Court is conclusive as to the question of the legislative intent. Railroad vs. Minn., 134 U. S., 456; Machine Co. v. Gage, 100 U. S., 677; Pullman Palace Car Co. vs. Penna., 141 U. S., 21.

The Supreme Court of Texas has decided that it was not the purpose of the legislature in passing the statute in question to regulate interstate commerce,—in discussing the shipment of beer from outside of the State of Texas and an agreement to sell same in Texas, which was adjudged void because it violated the statute. The court said: "The parties contracted for the sale and purchase of beer, to be transported from Milwaukee to Amarillo, to be there delivered to Kingsbury and to become his property. So far the transaction was *interstate commerce* and not subject to State regulation, without the consent of congress; *nor did the statute undertake in any way to regulate or prohibit same.* But the parties, by the same contract, voluntarily went further, and so dealt with the subject after it had ceased to be

an article of interstate commerce as to create a trust, as above shown, in violation of the statute." Fuqua vs. Pabst Brewing Co., 38 S. W. Rep., p. 30. This decision of the State Supreme Court settles that point.

That Texas has no authority to regulate interstate commerce is conceded. It is insisted that because it is made the duty of the Attorney-General to prevent corporations from doing business *within* the State if they violate this statute, that therefore its intention was to prohibit these corporations from doing an interstate traffic, and that it is therefore, at least to that extent, void. The language of the statute does not justify that construction. The decision of the court above cited is authority for the proposition that it was not the intention of the legislature in passing this statute to regulate or prohibit interstate commerce. It must, therefore, be concluded that the intention of the legislature was to compel the Attorney-General of the State to prevent corporations from *entering* the State and doing business as such *within* her territorial limits if they violated this statute. The doctrine that the State has the right to prescribe the terms upon which foreign corporations can come into its limits and do business within the State is not new. One of the terms and conditions which Texas has fixed for their admission and continuation is that they do not violate the anti-trust law. Pemb. Manufacturing Co. vs. Penn., 125 U. S., 123. See also authorities cited under this proposition on page 52 of the original brief.

It will thus be seen that the contention of appellee's counsel to the effect that the statute attempts to interfere with interstate commerce must fail.

Appellee insists that it denies to him due process of law. I cannot appreciate that contention in this case. If the statute is void at all, it must be because it denies appellee equality under the law. This brings us to consider whether the statute is void simply because it exempts from its operation agricultural products in the hands of the producer, and live stock in the hands of those who raise them. As heretofore indicated, nearly all legislation is in a sense special. It does not embrace all classes of property, nor all classes of persons. It is true that there are many acts that apply to every person within the limits of the

territory for which they are passed, but the great bulk of legislation applies to people or property in certain conditions only. The rule laid down by this court, as above stated, is that these discriminations, or classifications, as they are sometimes termed, will be upheld by this court, unless shown to be arbitrary. If the exemption is arbitrary the statute is unconstitutional. It is an elementary proposition that a statute is presumed to be valid until the contrary is shown, and that beyond a reasonable doubt.

Railway Co. vs. Casey, 26 Pa. Stat., 287.
State vs. Loughlin, 75 Mo., 147.
State vs. Addington, 77 Mo., 110-8.

It must therefore follow that unless the discrimination in question has been shown to be arbitrary, this statute must be upheld. If there is one construction or one hypothesis which is reasonable that would uphold the statute, then that construction or that hypothesis should be adopted, even though the other be more natural and more probable.

U. S. vs. Central Pac. Ry. Co., 118 U. S., 235-40.
Broughton vs. Pensecola, 93 U. S., 266.
Bedrock vs. Henry, 166 U. S., 599.
Hobbs vs. McLean, 117 U. S., 567.
U. S. vs. Coombes, 12 Pet., 72.
Ogden vs. Saunders, 12 Wheat., 270.
Grenada Co. vs. Brown, 112 U. S. 261.
23 Amer. and Eng. Ency. of Law., Subdiv. 2, p. 349, and authorities there cited.

I insist that the appellee has not discharged the burden which devolved upon him of showing that the discrimination in this case is arbitrary. He has therefore failed to show that the statute is unconstitutional. He cannot be heard to say that by showing a discrimination, that he has shifted the burden of proof on the appellant to show that the discrimination is reasonable. The burden never shifts from him who attacks the constitutionality of a statute. It has never been held that a statute which discriminates in favor of or against a certain class is invalid. When a person shows that a statute discriminates, he has only proved

half of his case. He must follow it up by showing that the discrimination is arbitrary and unreasonable. But in this case appellee has contented himself with showing that there is a discrimination, and has left this court to presume that it is arbitrary.

This court will not indulge in any presumptions against the validity of this statute. As a text-writer has said: "The legislature and judiciary are co-ordinate departments of the government; * * * and it is only when the courts find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action." Cooley's Const. Lim., Sec. 192-3. To find that the legislature has not kept within its constitutional limits in this case, this court must find that the statute discriminates, and that it discrimnates *without reason*, and that must appear beyond a reasonable doubt.

A court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizens, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution.

Cooley's Cons'. Lim., 6 Ed., p. 197.
Wellington, Petitioner, 16 Pick., 87-96.

If the rule were otherwise, the government would be such as arbitrary discretion of its judges might suggest, and would differ as often as courts differ. In the language of this court, "There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard. But it is equally undoubted that no court, except in the *clearest* cases, can properly impute the disregard of those principles to the legislature. * * * This court can know nothing of public policy except from the constitution and laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in geenral, be addressed to the legislature. Questions of policy determined there are concluded here." (License Tax Cases, 5Wall, 469).

All mere questions of expediency and all questions in respect to the just operation of the law within the limits prescribed by the Constitution were settled by the legislature.

Perry vs. Keene, 56 N. H., 530.
People vs. Fisher, 24 Wend., 215-20.
State vs. Staten, 6 Cold., 238.
Walker vs. Cincinnati, 21 O. St., 14.
State vs. Smith, 44 O. St., 348.

The cases last above quoted show that courts cannot set aside an act under the impression that they have discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is held that nothing but express constitutional limitations can control the action of the legislature.

Cooley's Const. Lim., 6 Ed., 204-5.
Cochran vs. Van Surlay, 20 Wend., 365, 381-3.

This express conflict must be susceptible of being pointed out.

People vs. New York Central R. R. Co., 34 Barb., 123.
Gentry vs. Griffith, 27 Tex., 461.

Has the conflict in this case been pointed out? The fact that the Texas legislature can pass no law in conflict with the fourteenth amendment to the Federal Constitution is admitted. But does this law conflict with the fourteenth amendment? The burden being upon the appellee to point out the conflict, I ask has it been discharged? If so, how has it been discharged? Have not counsel for appellee contented themselves with showing that the statute does not apply to all persons? In other words, that it discriminates, or exempts property from its operation under certain conditions. Is there anything new in that? Do not police regulations which are applicable alone to railroad companies exempt all other property from their operation? Do not the statutes and ordinances regulating the laundry business exempt all other kinds of business from their operation? Are not the regulations of the liquor traffic applicable alone to that class of business? Are not the statutes prohibiting the playing

of cards in public places, and exempting other games from their operation, in the same sense discriminative? It cannot therefore in fairness be said that this statute is void simply because it is not applicable to all classes of property and persons, without reference to the circumstances and conditions surrounding them. If it be void for that reason, then all the legislation above mentioned is likewise void. Counsel for appellee must go further than to say that there is a discrimination. They must show that it is an *unjust* or *unreasonable* discrimination; that it is arbitrary; that there was no reason to justify the legislative action.

In discussing this question, I submit that the same rule applies to this as to all other constitutional questions. If there is a doubt as to whether the discrimination is arbitrary, that doubt must be resolved in favor of the statute. In other words, if this court entertains a doubt as to whether the conditions justify this exemption, that doubt should be resolved in favor of the statute. It should not be forgotten that appellee's contention is that the legislature exceeded its authority when it engrafted the exemption complained of on the statute under discussion; in other words, that no sufficient reason existed for its exemption of agricultural products in the hands of the producers and live stock in the hands of the raisers from the operation of this statute. It is too clear for argument, as heretofore suggested, that upon appellee rests the burden of establishing the unreasonableness of the exemption. The statute was passed to affect conditions in Texas; it has no extra territorial operation. The reasonableness of the exemptions must be judged by the conditions in Texas existing at the date of the passage of the act, as well as since. And in this connection I deem it not improper to suggest that as to whether the conditions existed which justified this exemption, great weight should be given to the opinion of the Supreme Court of Texas. It is composed of lawyers, not only learned in the law, but cognizant of the conditions existing within their jurisdiction. Inasmuch as they have held the statute valid, it must be conclusively presumed that they, at least, believe the conditions in their State justified the exemption made. I do not mean to be understood to say that this court should abdicate its right to finally determine the question for

itself; this I know it ought not, and will not do, but I mean to say that in the first place, all of the presumptions favoring a statute passed by a legislature should be indulged by this court in favor of the one under discussion; and further than that, that inasmuch as the reasonableness of the exemptions rests upon the local conditions in Texas, the opinion of the Supreme Court of that State, that the conditions justify the exemptions, ought to receive the greatest consideration, and in the event of any doubt should be held sufficient to turn the scales in favor of the statute.

An examination of the statute under consideration will show that its purpose has been misunderstood by appellee. Its first section defines a trust as "A combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any or all of the following purposes: (1), to create or carry out restrictions in trade; (2), to limit or reduce the production or increase or reduce the price of merchandise or commodities; (3), to prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities; (4), to fix at any standard figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State; (5), to make, enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall in any manner agree to keep the price of such article, commodity, or transportation at a fixed or graduated figure," etc. It will be noted by the terms of the statute that all combinations of capital, skill or acts are not prohibited. But only those combinations entered into for one of the purposes therein named. It will also be apparent from an inspection of the act that the purpose was to prevent combinations which would result in destroying competition or fix the price which the consumers of Texas would have to pay for the necessaries of life. So evident is this purpose, that it rendered un-

lawful to increase the prices of commodities by fixing a standard freight rate by transportation companies, which would necessarily affect the price of the article used. The language of the statute clearly implies that its main purpose was to reach *manufacturers* and *dealers* in those commodities.

I have heretofore adverted in the original brief to the fact that the Supreme Court of the State have practically held such to be the purpose of this act. (Original brief, pp. 61–2; Ins. Co. vs. State, 86 Tex., 250.)

This court recognized the same condition in the case of the United States vs. Freight Association, 166 U. S., 319. In that case, speaking through Mr. Justice Peckham, it said that the "history of the times" shows that there was complaint at the rates charged by the railroad companies, as well as the combinations alluded to. The Texas statute covers the transportation question as well as others, and therefore was based on all of the complaints which the "history of the times" shows were made. This court judicially knows that there never was any complaint made that the farmers, as such, were controlling the prices of products which they raised. It is also true that there never was a complaint made in the United States to the effect that the stockraisers were controlling the price of beef. There never have been any complaints as to those two classes, and it would therefore have been a little singular for the legislature of Texas to undertake to prevent an evil, the existence of which was not recognized. This court takes judicial knowledge of everything that is generally known. It must be generally known to even the most casual observer of current events that the facts are as I have stated them here. There have been congressional investigations, legislative investigations and judicial inquiries to which the attention of the entire country has been directed, in which complaints have been made of combinations of capital and the destruction of competition. It was charged that they have successfully controlled the prices of all commodities necessary to existence. Indeed they controlled everything that has been eaten and worn. But in no instance has any complaint ever been made that the farmers of the United States had undertaken to control the prices of their products. If there had existed any cause for complaint, is it not reasonable to suppose that it

would have been made? If no ground of complaint existed, and therefore no complaint was ever made, why should the Texas legislature undertake to prevent something that has never happened, to prohibit a condition which had never heretofore existed, and which could not from the nature of things exist. To say that a statute is void because it does not prohibit results impossible to secure is absurd in the extreme. I repeat what I have heretofore said. Farmers cannot control the price of the products of their farms. It is well known that the financial condition of the farmers of the entire country is such as to render that sort of a combination impossible. It is true that many of them are in comfortable circumstances, but it is well known that particularly those who are tenants, and more of those of small holdings, are compelled to sell their farm products as soon as they can be prepared for the market. Therefore no combination can be made which will prevent their sale, because their necessities demand that they market their products immediately in order to pay the cost of production, and to prepare them to plant and raise the next year's crop. These facts are generally known. Therefore I take it that this court will take judicial knowledge of them, even though counsel for appellee do not deem them of sufficient importance to give them even a passing notice. I submit, therefore, that this exemption can be based upon two grounds:

First, That there had never been any complaint that the farmers and stock raisers had combined for the purpose of controlling the prices of products.

Second, That this court judicially knows that it would be impossible for them to make and execute an agreement which would have the results sought to be prohibited.

These facts being judicially known to the court, it must be held that the legislature was justified in making the exemptions. Certainly they are sufficient to raise in the minds of this court a doubt grave enough to keep it from saying that it has been made clearly to appear that the exemption is arbitrary, that there is no reason for its existence.

In this connection, permit me to suggest that the moment that the farmer or stock raiser becomes a dealer, the moment he begins to purchase the products of his neighbor farmers for the

purpose of dealing in them, he comes within the operation of this statute. Of this counsel for appellee most bitterly complain. Instead of it furnishing them any ground of complaint, it ought to excite their commendation, because it puts all dealers, whether they are farmers or not, upon precisely the same footing. If a merchant buys the products of the countryman's farm, he is prohibited from making an agreement which would destroy competition or fix a standard price at which he may sell them. The farmer who does that is in exactly the same situation. If the merchant has a farm, and raises farm products for sale and proceeds to sell them, the law does not apply to him as to those products, because he has raised them. The farmer is upon precisely the same basis. The same may be said of all other occupations. If they raise the farm products, the law does not apply to those products so raised. It is clear, therefore, that the statute applies to all persons similarly situated, and operates uniformly upon all under like circumstances.

Keeping in mind the fact that the statute was passed to protect consumers from the combinations mentioned therein, it becomes more apparent that the exemption of farm products in the hands of those who produce them, and live stock in the hands of those who raise them, does not vitiate the statute. It is well known to every one that the farmers do not sell their products directly to the consumer. Their surplus is always sold to dealers. Of course there are exceptional instances when small quantities may be sold to consumers, but as a rule the farm products are sold to dealers. They sell their live stock to drovers; their grain and other products are sold to dealers, who in turn sell them to the consumer.

For the reasons above given, the dealers need no protection from the farmers, because the farmers are unable to make and execute agreements which would be hurtful to the dealers; and as before suggested, they have never been known so to do. But the dealers can easily combine, as the history of the times has often demonstrated. It is to prohibit combinations of dealers in fixing prices or destroying competition that this statute was passed. Agreements made by wholesale dealers with those engaged in the retail business is a matter of common notoriety. There is scarcely a lawyer in the practice who has not

been called upon to examine and advise his client with reference to these cases. The reports of the supreme courts of every State in the Union contain decisions where said contracts have been made the basis of controversies. They are easily divisible into two classes: (1) Those in which the wholesale dealers require the retail dealers to purchase from them alone, thus by contract making competition impossible, and of course thus enabling the wholesale dealer to fix the prices at which he sells to the retail dealer. The retail dealer is compelled to make a profit or go out of business. The wholesale dealer thus indirectly fixes the prices at which the retail merchant sells to the consumers. (2) The wholesale dealers reserve the right to fix the price at which the retail dealers to whom they sell shall charge their customers and in this way they destroy all competition. To illustrate this, I made a statement of an actual agreement admitted in evidence in a case tried by the counsel in this case, viz., State of Texas vs. Waters-Pierce Oil Company; in describing the agreement therein alluded to I possibly made a technical mistake; my statement will bear the construction that the Waters-Pierce Oil Company, as such, entered into the original Standard Oil Trust. This was a technical error. The Waters-Pierce Oil Company did not sign the agreement in its own name, but it is recognized in the original Standard Oil Trust agreement as having signed by its *stockholders*. With this correction, the statement made in the original brief is correct, and counsel for appellee will not deny it. As to whether it is a proper matter for this court to consider or not, neither myself nor counsel for appellee are the best judges. If it is not proper, the court will not consider it; if it is a proper subject for consideration in this case, it is here for whatever it may be worth. The agreement referred to will be printed in the literature of the profession as soon as the case above mentioned can be officially reported. I had not supposed that there would ever be any controversy about it, or that counsel for the appellee would object to the statement here of what will be printed in the Texas court reports, and be distributed among all the courts of the land, including this, for use by bench and bar. The statement was not made with a view of giving this court

evidence upon which to act, but simply to illustrate the conditions which this court judicially know to exist.

The trial judge in his opinion filed, held that the act in question *made criminal all associations for business purposes.* This point is seized upon by counsel for the appellee, and is made the basis of an ingenious argument. The contention is that the definition of a trust given in the statute includes all partnerships, firms and corporations. In other words, the argument is based upon only a part of the definition given by the statute. The statute makes combinations illegal only when they are organized for the purposes therein named. An ordinary partnership or corporation, or business association, is not formed *for the purpose* of creating restrictions in trade, not to limit or reduce the production, or increase or reduce the price of merchandise or commodities, nor to prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities. Nor are they organized for the purpose of fixing at a standard figure the price of any commodities to the public whereby the price of such commodity may be controlled or established. Nor are they organized for the purpose of entering into or carrying out any contract, obligation or agreement of any kind or description by which they will have bound themselves not to sell dispose of or transport any article of merchandise, nor to sell it below a standard figure. The ordinary and usual purpose of a partnership is not to impose restrictions upon trade, not to fix a standard price, or destroy competition. Partnerships are ordinarily formed for the purpose of carrying on trade—*extending* it, rather than restricting it. They are entered into not for the purpose of destroying competition or fixing standard prices, but because their joint capital and combined skill are necessary for the transaction of the particular line of business.

Bates' Law of Partnership, Sec. 1.

Kent's Commentaries, 23.

Anderson's Law Dictionary, p. 749.

Or, as Stroud puts it, "A partnership is an agreement that something shall be attempted with a view of gain, and that the gain shall be shared by the parties to the agreement."

Stroud's Dictionary, title, Partnership.

Bouvier defines it as "An agreement between two or more persons for joining together their money, goods, labor, or skill, or either or all of them, *for the purpose of advancing fair trade*, and of dividing the profits or losses arising therefrom proportionally, or otherwise, between them."

Bouvier's Law Dictionary, title, Partnership.

There is a vast difference between "advancing fair trade" and restricting fair trade. They are just the opposite.

A corporation is but a different form of partnership. It is an artificial person created of several natural persons, whose status is clearly defined by law. It is likewise organized for the purpose of prosecuting some business. This view is emphasized by the further fact that the statute in question recognizes the legal existence of firms, corporations and associations of persons. In other words, it makes illegal the combination of two or more persons for any of the illegal purposes named in the statute. It likewise makes illegal the combination of two or more firms, of two or more corporations, or two or more associations of persons, for any of the unlawful purposes named. It is clear that it never entered the legislative mind that the existence of corporations, partnerships or business associations, would be thereby prevented. If such had been the intention of the legislature, it would have said so in plain and explicit terms. I called attention in the original brief to the fact that at various times since the passage of this statute, the legislature of Texas has further recognized the existence of corporations by amending the corporation laws. This has been pointed out on pages 34 and 35 of the brief. Moreover, the Supreme Court of the State, as shown in the brief, page 36, has held in substance, that the statute in question was intended *only* to prevent the combination of capital, skill or acts for *any of the purposes named in the statute*. The purpose of the act was to prevent the destruction of competition. That is the decision of the Supreme Court of the State. That decision should be held conclusive on this point. But it was not intended to accomplish any other result. Learned counsel for the appellee insist that it is immaterial whether a corporation or partnership are formed for the purposes named in the statute or not. That the motive of the partnership cannot always be as-

certained except by the results. They invoke the old legal maxim that every person is presumed to intend the reasonable and probable results of his own action. They insist that the reasonable and probable result of a partnership, firm or corporation is to create restrictions in trade and destroy competition; and, therefore, that persons forming such corporation or partnership must be presumed to have formed them for that purpose. The logic is faulty. I deny that the reasonable or probable result of forming a corporation or partnership is to create restrictions in trade, destroy competition, or do any acts which the statute sought to prohibit. Take any town or city in the United States in which one dozen firms are doing business. Does it make competition any less because this dozen mercantile establishments are conducted by firms or corporations rather than each by a separate individual? Are there not twelve competing factors in each of these towns or cities, as the case may be, and whether the entities that make these factors are artificial persons, that is to say corporations, or whether they are partnerships, is not the competition the same? To illustrate further, suppose that a town has twelve business partnerships in it. Would it increase the competition for one person to retire from each of these twelve firms? Would it enlarge the trade? It seems not. Let us put it another way. Suppose twelve men are engaged in the mercantile business in a town, each in competition with the other, and conducting an establishment of his own. Suppose each of these takes unto himself a partner, which makes the number that is engaged in the mercantile business in that town twenty-four. Has the trade been restricted? Has competition been destroyed or even lessened thereby?

I grant that it is possible to create a partial restriction in trade by the formation of a partnership, but the restriction would only be temporary. Competition would come again. But a man is not presumed to intend the *possible* results of his own action. If partnerships were destroyed it might result in destroying competition to a greater extent than their existence could possibly do. To illustrate: Suppose A and B desired to enter into a mercantile business in competition with a firm already in existence. Neither A nor B have sufficient capital to conduct the business, but combined they can make it successful.

If they are prevented from forming the partnership competition will not exist. But if they are permitted to form the partnership, competition will be created. It is plain, therefore, that instead of partnerships creating restriction in trade, they are absolutely necessary in some instances to create competition in trade. The same may be said of corporations, or any other business association. Suppose that it be sought to build a railway through Texas which would be parallel and in competition to a line already in existence. No individual can build this road; a corporation is necessary to accomplish that purpose. If the corporation can be organized the competing railroad can be built. If a corporation cannot be organized competition becomes impossible. It must follow, therefore, that the major premise of appellee's counsel, to the effect that the formation of partnerships and corporations create restrictions in trade, is erroneous. Therefore the conclusion deduced therefrom to the effect that the statute was designed to prevent the ordinary business association is erroneous.

I have no doubt that it is possible to create temporary restrictions in trade by the formation of partnerships or corporations. It is possible for two merchants living in the same town to form a partnership, and in that way destroy competition between themselves. But if there is room for another merchant, if the trade will justify it, he will come, and the result will be beneficial rather than hurtful to the community, in that it will give the particular village or town sufficient capital and skill to carry on the trade. Neither of these two merchants, left by himself, might be able to successfully conduct the business of the character which the needs of the particular community would demand. If it be conceded that the possible result of the partnership or corporation be to create restrictions in trade, still it will not follow that the people forming the partnership must have intended such a result. The rule, when most strictly applied, is that people are only presumed to intend the reasonable and probable result of their own action, but they are not always held responsible for the possible results of their own action. Take the New York Central Railroad. It was built for the purpose of transporting freight and passengers. It was a necessary aid to commerce. It was well known, however, when

it was constructed, that accidents were possible, and that the operation of the railroad would *possibly* result in loss of human life. It could not be said, however, that because that is one of the possible results, that the corporation was created for that purpose. Take a banking corporation. It is formed for the purpose of gain. All of the stockholders expect to increase the amount of their worldly goods by reason of their business venture. But conditions become such that the business is conducted at a loss. That is always possible. Must it be said that the stockholders entered into this corporation for the purpose of losing their money, because such a result was possible? Surely such a contention approaches the absurd, yet is the position of appellee.

But I will not pursue this subject further. I respectfully submit that the act was not intended by the legislature to prevent the formation of corporations, partnerships or business associations for any lawful purpose:

1. Because the language of the statute itself recognizes their lawful existence, and only seeks to prohibit them from the accomplishment of the purposes therein designated.

2. Because the legislature, both before and after the passage of this act, in several special enactments, attention to which has been called in the brief heretofore filed, recognized the lawful existence of corporations.

3. Because the Supreme Court of the State of Texas, in the case of Gates vs. Hooper, 39 S. W. Rep., p. 186, have substantially held in accordance with the contention of appellant herein, and that decision is conclusive on this court on the question of legislative intention.

4. Because the corporations, partnerships and business associations are not ordinarily formed for any of the purposes which the statute seeks to prohibit.

5. Because the accomplishment of any of the purposes sought to be prohibited by the statute is not the necessary, reasonable or probable result of the formation of corporations, partnerships and business associations, and therefore those who form them cannot be held to intend such results.

M. M. CRANE, Att'y Gen'l,
Attorney for Appellant, John W. Baker, Sheriff, etc.

Nos. 336, 337, 338 & 339

Add'l Br. of Crane for Appt.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

Nos. 336–339.

JOHN W. BAKER, SHERIFF, &c.,

vs.

WILLIAM GRICE ET AL.

ADDITIONAL AUTHORITIES AND PROPOSITIONS ON BEHALF OF APPELLANT.

The application of appellee was wholly insufficient, in that it stated conclusions and not facts. It did not show that appellee at any time applied to the State court for a trial or sought to have a day fixed for his trial, and hence did not show that a speedy trial was denied him.

Whitten *vs.* Tomlinson, 160 U. S., 242.

Ex parte Walpole, 84 Cal., 584.

Ex parte Nye, 8 Kans., 99.

Ex parte Dewy, 10 Nev., 212.

Voluntary surrender into the hands of the sheriff for the purpose of suing out the writ of *habeas corpus* is voluntary confinement, and is sufficient to deny him relief, and does not authorize the issuance of the writ of *habeas corpus*. It is no case of peculiar urgency. (Wales *vs.* Whitney, 114 U. S., 564.)

The sufficiency of the indictment was not made a question in the court below. If it was it has been expressly waived in this court. (Appellee's Brief, by Messrs J. D. Johnson and George Clark, page 9.)

Defects in the indictment may not be inquired into by *habeas corpus*.

Ex parte Whitaker, 43 Ala., 323.
Emanuel *vs.* State, 36 Miss., 627.
Davis case, 122 Mass., 324.
In re Kowalsky, 73 Col., 120.
Church on *Habeas Corpus*, sec. 246.

The guilt or innocence of the party cannot be inquired into.

Church on *Habeas Corpus*, sec. 247.
Concems *vs.* People, 18 N. Y., 129.

The exemption of agricultural products and live stock while in the hands of the producer or raiser does not vitiate the statute.

Soon Huy *vs.* Crowly, 113 U. S., 703, 708.

A prisoner will not be discharged in doubtful cases. The right must be clear.

Church on *Habeas Corpus*, 123.
Ex parte Crouch, 112 U. S., 178.

Neither the Texas Code of Criminal Procedure nor the decisions of the Texas courts cited by appellee justify the propositions made by him, that confinement is unnecessary in order to obtain the writ of *habeas corpus* from a State court; but if they do they are not applicable, because this court is not asked to administer the State statute, but the Federal law.

Wales *vs.* Whitney, *supra.*

Respectfully submitted.

M. M. CRANE,
Attorney General, Counsel for Appellant,
The State of Texas.